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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

CAFETERIA EMPLOYEES UNION, LOCAL 302, and WILLIAM MESEVICH,
Petitioners,
against
GUS ANGELOS, JOHN HARRIS, LUCAS HARRIS, NICK FELLOUGIS, HARRY GALATIS, MARY WAAL and DEMOSTHENES LOIZIDES.

No. 903 36

CAFETERIA EMPLOYEES UNION, LOCAL 302, and WILLIAM MESEVICH,
Petitioners,
against
ELIAS TSAKIRES, KALLIS CONSTANTINON, CHRIST LYMBOURIS, ANGELO CONSTANTINE, NICHOLAS RUSSOS, STELLA BELLAS, MARY YORWICK, JAMES LOIZIDES and LOUIS LOIZIDES.

No. 904 37

PETITION FOR REHEARING OF APPLICATION FOR WRITS OF CERTIORARI

LOUIS B. BOUDIN,
Of Counsel for Petitioners.

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PETITION FOR REHEARING OF APPLICATION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Cafeteria Employees Union, Local 302, and William Mesevich, respectfully pray for a rehearing of the petitions heretofore made by them in the above matters, which petitions prayed that writs of certiorari issue to review orders of the Court of Appeals of the State of New York affirming orders of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, affirming judgments of

the Supreme Court of the State of New York, County of the Bronx, in favor of certain plaintiffs and against these Petitioners, whereby Petitioners were enjoined and restrained from stationing pickets at or near certain cafeterias or restaurants located in the Borough of the Bronx, City of New York, State of New York.

And in support of this petition your Petitioners respectfully show to this Honorable Court:

I. On May 17, 1943, this Court entered the following order in the above matters, as your Petitioners are informed and verily believe:

> "The petition for writs of certiorari in each case is denied on the ground that it does not appear from the record that the Federal question presented by the petition was properly presented to or expressly passed on by the New York Court of Appeals."

II. Your Petitioners respectfully submit that the said order was made by this Court under a misapprehension of the facts, in that the Federal question presented by the petitions heretofore filed by your Petitioners was properly presented to and expressly passed upon by the New York Court of Appeals, and the said fact appears in the respective records of the said cases submitted with the said petitions, as will appear from the facts hereinafter stated, and the Court of Appeals has agreed to so certify.

III. Each of the said records show that in the notice of appeal to the Court of Appeals of the State of New York from the order of affirmance made by the Appellate Division of the Supreme Court of the State of New York, the Federal question was specifically raised, in that each of the said notices of appeal contained the following, to wit:

> "PLEASE TAKE FURTHER NOTICE that the appeal is taken upon the following ground, among others:

> That said judgment and order are violative of the Constitution of the United States, particularly Amendments I, V and XIV thereof, and the Constitution of the State of New York, particularly Article I, Section 8, thereof."

The said statement is printed in the record of the case entitled below, "Gus Angelos, et al. v. William Mesevich, etc." (No. 903 in this Court), at page 101 thereof, and in the case entitled below, "Gus Angelos, et al. v. William Mesevich, etc." (No. 904 in this Court), at page 104 thereof.

IV. The Federal question was passed upon by the Court of Appeals of the State of New York, and was, in fact, one of the principal points upon which the said Court divided, as may be seen from the following:

The opinion of the majority of the Court of Appeals, written by Associate Judge Rippey, contains the following language, to wit:

> "It has been found by the lower courts that the picketing of the World Cafeteria was at all times orderly and peaceful and that no acts of violence had been threatened or committed by the defendant union. *The defendant had the constitutional right accurately and truthfully and without violence, force or coercion, or conduct otherwise unlawful or oppressive to make their grievances known to the public.* (*Wohl* v. *Bakery & Pastry Drivers & Helpers Local 802*, supra.) But a citizen is not required to tolerate peaceful picketing accompanied by untruthful representations, interference with his business or coercive conduct designed to injure or destroy his business whether a labor dispute exists or not."

(Record in *Angelos* case, at pp. 116-117. The decision in the *Tsakires* case specifically refers to the opinion in the *Angelos* case, the two cases having been heard and decided together.)

This clearly shows that the Federal question was considered by the Court of Appeals, and that the decision

proceeded upon the theory that peaceful picketing with truthful signs, which is the Federal right involved, is considered by the State Court to be an "interference" with business or "coercive conduct designed to injure or destroy" the business of an employer. This is not changed by the fact that the majority of the Court refers to peaceful picketing with "untruthful" signs, since, as a matter of fact, the signs actually used were not untruthful; and, besides, the judgment appealed from did not differentiate between picketing with truthful and picketing with untruthful signs, and prohibited *all picketing with whatsoever signs.*

Both the fact that the Federal question was actually considered and passed upon, and that it was decided not only adversely to the claim of Petitioners, but also contrary to controlling decisions of this Court becomes more apparent from the dissenting opinion written by Associate Judge Desmond, on behalf of three members of the Court of Appeals, including Chief Judge Lehman. In that opinion the minority of the Court of Appeals say, among other things:

> "Even if this injunction were not unlawful under section 876-a and under our decisions, early and late, even if there were no labor dispute and no case growing out of a labor dispute, this ban against peaceful picketing would still be violative of the Federal Bill of Rights. Most plainly is this pointed out in *Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl* (315 U. S. 769), where the Supreme Court noted (p. 774) that the New York courts had seemed to assume that the legality of the injunction followed from a determination that a labor dispute was not involved. 'Of course,' said the Supreme Court, 'that does not follow: one need not be in a "labor dispute" as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.' (See, also, *Thornhill* v. *Alabama*, 310 U. S. 88, 100; *Milk Wagon*

Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 296-298; *American Federation of Labor* v. *Swing*, 312 U. S. 321.) Nothing is now better settled than that picketing is an exercise of the constitutional right of free speech, that it needs no authorization from the State, which may in proper case regulate picketing, but may never forbid it."

V. The Federal question was necessarily passed upon by the Court of Appeals of the State of New York, since it was properly raised in that court as well as in the Appellate Division of the Supreme Court. Petitioners are informed that some doubt has arisen in the minds of the Justices of this Court as to the possibility that the New York Court of Appeals may not have been in a position to pass upon the Federal question because of some procedural defect in the manner of the presentation of the said question under the laws of the State of New York, because of the concluding statement of the opinion of the majority of the Court of Appeals, reading: "No exceptions appear in the record which raise any other question of law open for our further consideration." The said statement, we are informed and verily believe, refers to questions other than those actually raised and passed upon by the Court, including the Federal question, as is indicated by the word "other", and relates particularly to possible questions of admission and exclusion of evidence, since no exceptions are necessary under the laws of the State of New York for the purpose of raising the Federal question here involved. The Federal question arises from the form of the judgment, and would not have arisen if the judgment only restrained picketing accompanied by violence or false signs. In this connection the attention of the Co is respectfully called to the fact that the Judgments involved, and the Decisions upon which they were entered, containing findings of fact and conclusions of law, were entered several days after the cases were finally submitted to the Justice who tried the same, as the records show;

and under the laws of the State of New York no special exception is necessary either to a finding of fact or conclusion of law made after the final submission of a case in order to raise any question presented thereby. Section 445 of the Civil Practice Act of the State of New York provides as follows:

> "Subject to the provisions of section four hundred forty-six of this act, an exception shall be deemed to have been taken by the party adversely affected to every ruling either before or after the cause is finally submitted, where such party, at the time when such ruling is sought or made, makes known to the court, judge or referee his position thereon by objection or otherwise.
>
> Where an issue of fact is tried by a referee or by the court without a jury an exception shall be deemed to have been taken by the party adversely affected to the granting or refusal of every request to find, and to every ruling upon a question of law made after the cause is finally submitted."

The exceptions in the following section, referred to in the section just quoted, refer solely to the charge of the Court and request to charge in cases tried before a jury.

VI. Since the making of the order by this Court on May 17, 1943, Petitioners have moved in the Court of Appeals of the State of New York for an order requesting the return by the Supreme Court of the State of New York, County of the Bronx, to the Court of Appeals, of the Remittiturs of the last named court, and for the amendment of the same so as to specifically state that the Federal question here involved had been properly raised in the State Courts, and actually passed upon by Court of Appeals. The said motion was granted by the Court of Appeals on May 27, 1943, as is shown by the following memorandum published in the New York Law Journal, the official publication for the First Judicial Department of the Supreme Court of the State of New York, on May 28, 1943:

"Motion to amend remittiturs granted. Return of remittiturs requested, and when returned, they will be amended, by adding thereto the following: 'Upon this appeal there was *presented and necessarily passed upon* a question under the Constitution of the United States, viz.: The defendants argued that the injunction granted herein violated the rights of freedom of speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. This Court held the injunction aforesaid did not violate the rights of freedom of speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.'"

VII. Petitioners further submit that the question sought to be reviewed in this Court is of the greatest public importance, not only because of the nature of the question itself but also because a failure to review the same and to maintain the construction of the First and Fourteenth Amendments to the Constitution of the United States as laid down by this Court in its decisions particularly mentioned in the dissenting opinion of the minority of the Judges of the Court of Appeals of the State of New York will unsettle an important branch of our constitutional law, and will affect not only the State of New York but the entire country. The great importance of the question is specifically pointed out in the opinion of the minority of the Court of Appeals in the following forceful language with which that opinion concludes:

> "In this small lawsuit there is at hazard, just as surely as in great strifes that sweep the world, an ancient and inalienable right. *If that right cannot find vindication in the courts, it has little chance elsewhere.*"

VIII. Petitioners are informed that the said Remittiturs have not as yet been physically amended by the Court of Appeals, for the reason that the same have not as yet been returned to it by the lower court where they are now physically lodged. Petitioners therefore pray for permis-

sion to file with this Court, in support of this petition and of the original petitions for writs of certiorari, certified copies of the amended Remittiturs, when the same shall have been amended by the Court of Appeals, and a certification thereof obtainable.

WHEREFORE, your Petitioners pray that an order be made by this Court directing a rehearing of the petitions for writs of certiorari heretofore filed in the above matters, and that upon such rehearing the said petitions be granted and the writs issue as therein prayed for.

Dated: New York, June 3, 1943.

LOUIS B. BOUDIN,
Of Counsel for Petitioners.

20 West 43rd Street,
New York City.

I, the undersigned, counsel for the Petitioners in the above entitled matters,

DO HEREBY CERTIFY that the foregoing petition is presented in good faith and not for delay.

Dated: New York, June 3, 1943.

LOUIS B. BOUDIN,
Of Counsel for Petitioners.

20 West 43rd Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

Nos. 36-37.—October Term, 1943.

Cafeteria Employees Union, Local 302, and William Mesevich, Petitioners, 36 *vs.* Gus Angelos, John Harris, Lucas Harris, et al.	On Writs of Certiorari to the Court of Appeals of the State of New York.
Cafeteria Employees Union, Local 302, and William Mesevich, Petitioners, 37 *vs.* Elias Tsakires, Kallis Constantinon, Christ Lymbouris, et al.	

[November 22, 1943.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We brought these two cases here to determine whether injunctions sanctioned by the New York Court of Appeals exceeded the bounds within which the Fourteenth Amendment confines state power. 319 U. S. 778. They were argued together and, being substantially alike, can be disposed of in a single opinion.

We start with the Court of Appeals' view of the facts. In No. 36, petitioners, a labor union and its president, picketed a cafeteria in an attempt to organize it. The cafeteria was owned by the respondents, who themselves conducted the business without the aid of any employees. Picketing was carried on by a parade of one person at a time in front of the premises. The successive pickets were "at all times orderly and peaceful". They carried signs which tended to give the impression that the respondents were "unfair" to organized labor and that the pickets had been previously employed in the cafeteria. These representations were treated by the court below as knowingly false in that there had been no employees in the cafeteria and the respondents were "not unfair to organized labor". It also found that pickets told prospective customers that the cafeteria served bad food, and that by "patronizing" it "they were aiding the cause of Fascism".

The circumstances in No. 37 differ from those in No. 36 only in that pickets were found to have told prospective customers that a strike was in progress and to have "insulted customers . . . who were about to enter" the cafeteria. Upon a finding that respondents required equitable relief to avoid irreparable damages and that there was no "labor dispute" under the New York analogue of the Norris-LaGuardia Act (§ 876-a of the New York Civil Practice Act), the trial court enjoined petitioners in broad terms from picketing at or near respondents' places of business. The decrees were affirmed by the Appellate Division (264 App. Div. 708), and were finally sustained by the Court of Appeals, its Chief Judge and two Judges dissenting. 289 N. Y. 498, 507.

In *Senn* v. *Tile Layers Union*, 301 U. S. 468, this Court ruled that members of a union might, "without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." 301 U. S. at 478. Later cases applied the *Senn* doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy. *A. F. of L.* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769. To be sure the *Senn* case related to the employment of "peaceful picketing and truthful publicity". 301 U. S. at 482. That the picketing under review was peaceful is not questioned. And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist"—is not to falsify facts. In a setting like the present, continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives.

But here we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket. We have before us a prohibition as unrestricted as that which we found to transgress state power in *A. F. of L.* v. *Swing*, *supra*. The Court here, as in the *Swing* case, was probably led into error by assuming that if a controversy does not come within the scope of state legislation limiting

the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him". *A. F. of L.* v. *Swing*, 312 U. S. at 326.

The present situation is thus wholly outside the scope of the decision in *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287. There we sustained the equity power of a state because the record disclosed abuses deemed not episodic and isolated but of the very texture and process of the enjoined picketing. But we also made clear, "that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence". 312 U. S. at 296. Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing.

The judgments must be reversed and the causes returned to the state court for further proceedings not inconsistent with this opinion.

So ordered.